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U.S. DISTRICT COURT  
U.S. BANKRUPTCY COURT  
DISTRICT OF IDAHO

NOV 14 2003  
4:15 P.M. REC'D  
LODGED FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

CHRIS J. DENNISON

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY)  
an Illinois corporation; CNA GROUP )  
LIFE ASSURANCE COMPANY, a )  
wholly owned subsidiary of Continental )  
Casualty Company, RURAL )  
TELEPHONE COMPANY, and Idaho )  
corporation )

Defendants.

Case No.: CV02-0507-S-LMB

**PLAINTIFF'S MEMORANDUM  
IN RESPONSE TO DEFENDANT  
CNA'S OBJECTION TO PLAINTIFF'S  
MOTION TO COMPEL**

COMES NOW The Plaintiff, by and through his attorneys of record, Comstock & Bush, and hereby submits the following reply memorandum in support of Plaintiff's Motion to Compel Discovery; and, in opposition to Defendants response memoranda to same.

**PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT CNA'S OBJECTION TO  
PLAINTIFF'S MOTION TO COMPEL - 1**

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I.

**INTRODUCTION**

Before the Court are Defendant CNA's Motion in Limine / Motion for Protective Order, seeking to limit the Court's review of this matter to the administrative record; Plaintiff's Objection to this motion; and, Plaintiff's Motion to Compel - thereby allowing Plaintiff to conduct limited discovery by way of deposing certain of Defendants' agents whose decisions and information led to the denial of Plaintiff's claim for disability benefits.

Defendant CNA has argued that the Court's review of this matter should be confined to the administrative record and argues this under three premises:

1. Plaintiff has failed to identify an apparent conflict of interest;
2. If there is an apparent conflict of interest, there is no precedent which grants discovery; and,
3. Plaintiff fails to show sufficient basis to allow discovery.

Plaintiff respectfully disagrees - based on the actual record, his initial memorandum and documents in support, and the following.

II.

**ARGUMENT**

**A. DEFENDANT CNA ACTED AS THE PLAN ADMINISTRATOR**

Defendant CNA adamantly asserts that since the applicable plan *description* designates Defendant Rural as the Plan Administrator, Defendant CNA (and its

actions), is without accountability for its de facto administration, processing and decision-making relating to Plaintiff's claim. According to the Defendant CNA, Plaintiff has failed to show that CNA was acting, *in fact*, as the plan administrator. Therefore, according to CNA's argument, since it is not both the funding source and the administrator, there can be no apparent conflict of interest. Thus, Plaintiff is not entitled to conduct discovery. Plaintiff submits that based on the facts and the actual record, this argument must fail. The pertinent policy language reads:

THE PLAN IS ADMINISTERED BY THE PLAN ADMINISTRATOR THROUGH AN INSURANCE CONTRACT PURCHASED FROM CONTINENTAL CASUALTY COMPANY.

THE ADMINISTRATOR AND OTHER PLAN FIDUCIARIES HAVE DISCRETIONARY AUTHORITY TO INTERPRET THE TERMS OF THE PLAN AND TO DETERMINE ELIGIBILITY FOR AND ENTITLEMENT TO BENEFITS IN ACCORDANCE WITH THE PLAN.

R. at 00106

Defendant CNA, as a named fiduciary and/or as the de facto plan administrator, of Defendant Rural, controlled the entire claim process. Defendant CNA processed the claim. Defendant CNA determined whether Plaintiff was eligible. Defendant CNA denied Plaintiff's claim for benefits. On three separate occasions. Defendant Rural, the named "administrator", did little, if anything, to process the claim other than providing misleading statements regarding the Plaintiff and his employment, which Defendant CNA in turn utilized in its determination to deny benefits. The actions of Defendant CNA can only be characterized as those taken by a plan administrator or, at the very least, a fiduciary of the Plaintiff. For example, Defendant CNA states it "was

given discretion to determine eligibility of benefits under the applicable long term disability plan..." (admitting at least its fiduciary role), See, *Defendant's Response Memorandum at 2*. "CNA, in determining whether Plaintiff qualified as disabled..." *DRM at 7*. "... CNA denied benefits." and "CNA affirmed its denial of benefits." See, *Defendant's Response Memorandum at 8*. "CNA made its decision..." See, *Defendant's Response Memorandum at 9*. The only record of Defendant Rural participating in the claim process is by way of providing Defendant CNA with false and misleading information, that is, that Rural would make any reasonable accommodation for Plaintiff's physical condition. This, when Rural had already terminated the Plaintiff due to exhaustion of his sick/vacation days; which he had to use because he was disabled from work. Defendant Rural did not review Plaintiff's claim. Defendant Rural did not decide on his eligibility. Defendant Rural did not deny Plaintiff's claim. And, Defendant Rural did not review his appeal and affirm the denial of Plaintiff's claim. Defendant CNA did all of this. Such actions are in fact, as well as in deed, the actions of a plan administrator. The argument that the plan document identifies its administrator and we should ignore CNA's role lacks credibility. It replaces substance with form. Furthermore, even if CNA is found to be merely a fiduciary and not the actual or de facto plan administrator, its very actions evidence a conflict of interest because of its fiduciary capacity. The plan is in place for the benefit of the Plaintiff, the beneficiary. The actions of CNA in this case can hardly be characterized as acting in the best interests of the Plaintiff. CNA, as a fiduciary of the Plaintiff, owes a duty to administer the plan in an equitable fashion, not make every effort available to justify

denial of benefits.

**B. PLAINTIFF RELIES UPON LEGAL PRECEDENT FOR HIS POSITION**

Defendant CNA claims there is no precedent which grants Plaintiff the right to conduct discovery. This argument fails as well. CNA claims the Ninth Circuit is devoid of such a precedent and points to *Dames v. The Paul Revere Life Insurance Co.*, 49 F. Supp. 2d, 1194, 1199 (D.C. Or. 1999), as proof. The *Dames* decision, in fact, supports Plaintiff's position. "If Dames had produced evidence that Paul Revere's benefits decision was tainted, she would have been entitled to limited discovery to flesh out that conflict." *Dames*, 49 F. Supp. 2d at 1203. (Emphasis added). In the instant matter, Plaintiff has been denied benefits by CNA (wearing both administrator and funding source hats). Likewise, *Shey v. Unum Life Insurance Company of North America*, 145 F. Supp. 2d 919, (N.D. Ohio 2001), cited by CNA, says that an irrebuttable presumption that a conflict of interest, or bias, exists whenever the same entity wears both the plan administrators hat and the payors hat. The *Shey* Court then refused to accept the Ninth Circuit's approach to limited discovery.

Defendant CNA, at the time of its decision, possessed objective medical evidence from Plaintiff's treating physician that Plaintiff was totally disabled months before his claim was submitted and was unable to work at any job due to his disability. Plaintiff had not worked for several months due to his disability and, had been terminated because he had exhausted his sick leave while on disability. Plaintiff's employer falsely informed CNA that accommodations would be made for Plaintiff and CNA in turn relied upon this false information in making its benefits determination.

With these facts of record, Plaintiff would submit that under a *Dames* analysis, he is entitled to limited discovery to "flesh out that conflict" manifested by the "tainted decision" of CNA.

C. PLAINTIFF'S SHOWING DOES WARRANT PERMISSION FOR LIMITED DISCOVERY

Next, Defendant argues that Plaintiff has failed to show a sufficient basis to allow discovery. Defendant argues insufficient "cause or purpose behind the (Plaintiff's) requested discovery", and suggests that "Plaintiff should at a minimum be required to show that there is evidence of a tainted decision caused by a conflict of interest before the Court allows Plaintiff to undertake depositions." See, *Defendant's Response Memorandum at 5*. Respectfully, Plaintiff would submit that based on the record and the law, CNA had a conflict of interest when it denied Plaintiff's claim. Defendant attempts to justify its denial of benefits (the tainted decision) by stating that Plaintiff failed to make a "sufficient showing of disability and inability to engage in his occupation" because he did not "provide objective medical findings as well as specific restrictions and limitations which prevented him from engaging in his occupation." See, *Defendant's Response Memorandum at 7*. Simply put, CNA chose to ignore the record. It never asked to examine the Plaintiff or refer the findings to a medical doctor. Examples of the "objective medical findings" Plaintiff provided to CNA can be found throughout the administrative record. On February 7, 2002, Dr. Frizzell examined the Plaintiff and noted in his chart that "he still has disabling back pain and is not able to work." R. at 000012. "The patient is disabled from his spine condition and is not able

to work. He is not able to work with accommodations." R. at 000019. (Emphasis added). "Constant neck and back pain from multiple past surgeries" and, "significant degenerative changes in lumbar spine with narrowing" and, that Plaintiff's "condition is chronic and has regressed over time - chronic pain in lumbar and cervical spine." R. at 000054 -000055. Perhaps most compelling are Dr. Frizzell answers to CNA's claim form, Part C. Here, Dr. Frizzell is asked the date he advised the patient to stop work due to his condition. Answer: 2/7/02. Next, Dr. Frizzell is asked the date he advised the Plaintiff to return to work in any capacity. Answer: No. R. at 000056.

CNA never addressed Plaintiff's disabling pain which Plaintiff reported:

Beginning in April 2001 through today the pain has progressed in frequency, duration and intensity. I attempted to get by with over-the-counter pain medications. Two weeks ago the pain became so intense I returned to see R. Tyler Frizzell M.D. Ph.D., on January 29, 2001, (sic) about the problem. He ... prescribed pain medication. I could not carry on with my job duties with the amount of pain I was experiencing. I could not, and still can't, stand or sit-up for longer than 10 to 15 minutes without shaking from the pain. My arms and legs become numb and lose feeling. When I attempt to stand up from sitting I initially lose my balance. I have no feeling in my fingertips and toes. The pain from my neck causes migraine headaches, causing an additional impediment to performing my job duties. I couldn't, and still can't, function while performing my job obligations because of the pain. (Emphasis added).

R. at 000049.

Dr. Frizzell's objective medical findings were based on his on-going examinations and long-term treatment of the Plaintiff. These findings are reflected in his chart notes and the letters concerning the Plaintiff submitted to the Defendant during the claim process. According to Dr. Frizzell, the Plaintiff was totally disabled beginning February 7, 2002, and could not work at any job. Contrast this assessment

with the determination made by Defendant CNA, reading into the records its own interpretation. An interpretation which is based on an erroneous application of Dr. Frizzell's listing of physical limitations while ignoring the plain statement that he is disabled. A decision based upon Defendant Rural's job description and false representation of accommodation. Weighing the depth of CNA's denial or lack thereof, "tainted decision" readily comes to mind.

Lastly, Defendant claims that "the fact that the benefits decision may have been contrary to that of Dr. Frizzell, is no evidence of a conflict of interest." See, *Defendant's Response Memorandum* at 10. Given the fact that no physician examined Plaintiff, or for that matter, even reviewed Plaintiff's medical chart, Plaintiff submits that the only medical findings in the record warrant a grant of benefits, not summary denial, and he should be allowed to explore the depth of CNA's denial.

### **CONCLUSION**

Based on the above, there is an obvious conflict of interest and sufficient evidence and authority to allow Plaintiff limited discovery in this matter. Therefore, Plaintiff respectfully requests this Court's order granting Plaintiff's Motion to Compel, allowing Plaintiff to conduct limited discovery in the form of undertaking depositions of Defendants' agents responsible for the denial of his claim for benefits and of Michael Richmond, and denying Defendants Motion in Limine / Motion for Protective Order.



Respectfully Submitted This 14<sup>th</sup> day of November, 2003.

COMSTOCK & BUSH

By:

  
David E. Comstock, Of the Firm  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of November, 2003, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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